

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

1. Jagdish Vs. State of Raj.
(D.B. Criminal Appeal No.951/2001)
2. Abdul Qayum & Another Vs. State of Raj.
(D.B. Criminal Appeal No.952/2001)
3. Farukh Ali Vs. State of Raj.
(D.B. Criminal Appeal No.950/2001)
4. Haseeb & Another Vs. State of Raj.
(D.B. Criminal Appeal No.953/2001)

D. B. Criminal Appeals under Sec.374(2) Cr.P.C.
against the judgment dated 23-10-2001 in Sessions
Case No.13/2000 (12/1997) passed by Sh. L.R.Bairwa,
RHJS, Special Court (Communal Riots Cases) Tonk.

Date of Judgment:

July 26, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE SANGEET LODHA

Mr. S.R.Bajwa, Senior Advocate with] for the appellants.
Mr. V.R.Bajwa]
Mr. S.S.Sunda]
Mrs. Naina Sarraf]

Mr. M.L. Goyal, Public Prosecutor for the State.
Mr. Suresh Sahni, for the complainant.

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

Challenge in these appeals is to the judgment dated October 23, 2001 of the learned Special Judge (Communal Riots Cases) Tonk whereby the appellants, six in number, were convicted and sentenced as under:-

Appellants Abdul Qayum, Jagdish, Farukh Ali, Haseeb, Nasseb and

Bundu:

U/s.302/149 IPC:

Each to suffer imprisonment for life and fine of Rs.500/-, in default to further suffer one month imprisonment.

U/s.148 IPC:

Each to suffer rigorous imprisonment for two years and fine of Rs.300/-, in default to further suffer fifteen days imprisonment.

Sentences were directed to run concurrently.

2. The prosecution story is woven like this:-

On October 5, 1996 at 4.15 PM informant Mohd. Aslam (Pw.8) submitted a written report (Ex.P-19) at Police Station Sadar Purani Tonk with the averments that around 3.45 PM on the said day while the informant and his uncle Abdul Rasheed were proceeding towards their house, the six appellants belaboured Abdul Rasheed in front of Kirana shop near Khari Babdi and started inflicting blows with Swords, Guptis and Knives on the person of Abdul Rasheed as a result of which he fell down. Leaving Abdul Rasheed on the road in a pool of blood the appellants fled away. Informant and his brother Guddu (Pw.9) then saw at Abdul Rasheed and found that he was no more. Guddu started weeping and left for the house. In the meanwhile the police arrived. The police and the informant took Abdul Rasheed to the hospital. On that report case under sections 147, 148, 149 and 302 IPC was registered and investigation commenced. Dead body was subjected to autopsy, necessary memos were drawn, statements of witnesses were recorded, the appellants were arrested and after completion of investigation charge sheet was filed. In due course the case came up for trial before the learned Special Judge (Communal Riots Cases) Tonk. Charges under sections 148 and 302 read with 149 IPC were framed against the appellants, who denied the charges and claimed trial. The prosecution in

support of its case examined as many as 20 witnesses. In the explanation under section 313 Cr.P.C., the appellants claimed innocence. Eleven witnesses in defence were however examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated herein above.

3. We have heard rival submissions advanced before us and carefully scanned the evidence adduced at the trial.

4. Death of deceased Abdul Rasheed was concededly homicidal in nature. As per postmortem report (Ex.P-23) following ante mortem injuries were found on the dead body:-

1. Incised wounds (Horizontal)(two in no) size is varying 1" to 2" x ½" to ¾" x bone deep covering area of 2" x 2" situated over mid part of lower 1/3rd of back (mid line & on the left side).
2. Incised wound Horizontal directing from medial to lateral 5" x 1" (medial 1/2) & ½" (Lateral ½) x muscle side deep situated over mid part of back of upper neck.
3. Incised wound Horizontal directing from medial to lateral 5" x 1" x muscle side deep situated over Rt. Occipital region.
4. Incised wound ¾ x 1/8" through & through cutting upper, outer border of Rt. pinna.
5. Incised wound Horizontal directing from lateral to medial 4" x 1" to ½" Lateral to medial x bone deep situated over Rt. parietal region anteriorly.
6. Incised wound oblique directing from lateral to medial side size 10" x ½" (Lateral ½) & ¼" (medial ½) x muscle to skin deep from lateral to medial situated over Lt. fronto parietal region.
7. Incised wound oblique directing from posterior to anterior side size 6" x ½" to 1" from posterior to anterior side cutting Rt. parietal bone & exposing brain matter below inj.no.5.
8. Incised wound vertical directing from below upwards size 8" x 1" (middle 2/3) & ¼" (both corners) x muscle deep situated over back of upper 2/3rd of Rt. Forearm.

9. Incised wound oblique directing from medial to lateral side size 2" x ½ to ¼ x skin deep over lower 1/3rd of Rt. Forearm anteriorly.

10. Little finger of Rt. hand has been amputated from 1st inter phalangeal joint.

11. Incised wound oblique directing from below upwards & communicating with other wound size 3" x 1½ x muscle deep over middle 1/3rd of Rt. arm (inner side)

12. Incised wound vertical directing from below upwards size 4" x 1½ x muscle deep & communicating with inj.no.11.

13. Incised wound oblique directing from medial to lateral side size is 3" x ¾ to ½ x muscle deep over front of upper 1/3rd of Rt. arm.

14. Punctured wound obliquely placed size 4" x ¾" x communicating with abdominal cavity & cutting skin sub-cutaneous tissues, muscle & peritoneum. A piece of loop of small intestine was protruding through the wound situated over Rt. upper abdomen.

15. Punctured wound vertically placed directing from upper to lower side size 3" x 1" x communicating Rt. chest cavity piercing Rt. middle lobe of lungs.

16. Punctured wound obliquely placed directing from below upwards size 4" x ¾ to ½ from below upwards x communicating with Rt. thoracic cavity piercing lower lobe of Rt. lung.

17. Punctured wound obliquely placed directing from below upward. Size 3½ x 1" x communicating with abdominal cavity and through which small intestine is protruding (a loop of it) & cutting distal end of stomach (laceration).

18. Incised wound Horizontal size 8" x 3" x muscle deep over lower ½ of Rt. arm anteriorly.

19. Incised wound (two in no.) size varying from 2" to 3" x ¾ to 1½ x bone deep (cutting bones of Lt. wrist joint and 1st and 2nd metacarpal bones of Lt. hand covering area of 3" x 2").

The cause of death in the opinion of Dr. V.K.Nigam (Pw.6), who performed autopsy on the dead body, was hemorrhagic shock due to injuries to vital organs.

5. The prosecution case is founded on the testimony of Mohd. Aslam (Pw.8), Guddu (Pw.9) and Aziz (Pw.11). All the three witnesses were

thickly related to the deceased being his real nephews and brother. Mohd. Aslam (Pw.8) in his deposition stated that on the fateful day around 3.45 PM while he along with his uncle Abdul Rasheed were proceeding towards their house his brother Guddu met him on the way. He for a while stayed to by Gutkha while Abdul Rasheed went ahead. As soon as Abdul Rasheed reached near Khari Babdi he was belaboured by Hasib, Nasib, Bundu, Farukh, Jagdish and Qayum, who were armed with knives, Gupti, Churries and sword. They started inflicting injuries on the person of Abdul Rasheed. He although raised alarm yet could not dare to save his uncle. Abdul Rasheed fell down on the ground and died. The assailants then fled away. Guddu started weeping and went to the house to inform about the incident. In the meanwhile police arrived in a vehicle and took his uncle to the hospital. He also accompanied the police. Mohd. Aslam was subjected to searching cross examination wherein he stated that he had gone with his uncle to the house of one Sayeed Ahmad and stayed there about one hour. He did not know what transpired between his uncle and Sayeed Ahmad. He himself did not have a talk with Sayeed Ahmad. Guddu had come to Chhota Bajar after taking tea from Musabbir's hotel. Gutkha was purchased by him from Jain Pan Bhandar. There were ten-twelve shops near the place of incident and the police station was about half kilometer away. He admitted that on the date of examination, he was suffering sentence for committing offence under section 302 IPC. He further stated that FIR was drawn in the hospital in the presence of his family members and 100-150 Mohallahwalas.

6. Testimony of Mohd. Aslam gets corroboration from the evidence of Guddu (Pw.9). In his deposition Guddu stated that he after taking tea while he was standing outside Musabbir's Hotel, he saw his

brother Aslam and uncle Abdul Rasheed coming from the side of Nagron ka chowk. Aslam got halted since he wanted to buy Gutkha and uncle Abdul Rasheed proceeded ahead. Thereafter he along with Aslam also proceeded. As soon as Abdul Rasheed reached near Khari Babdi, Nasib, Hasib, Bundu, Farukh, Jagdish and Qayum indiscriminately started inflicting blows with knife, Gupti, Sword and Chhurri. After killing his uncle the assailants fled away. All the shops got closed at the time of incident. In his cross examination he however claimed that the shops were opened at the time of incident but got closed after the incident. He further stated that since his uncle was dead, he did not touch his body. He admitted that while going towards the house he did not lodge report at Police Station. He also admitted that he was undergoing sentence for the offence under section 302 IPC.

7. Aziz (Pw.11), brother of deceased, deposed that in the afternoon around quarter to four while he was going towards his house, he saw Farookh, Bundu, Nasib and Hasib running. They were coming from the side of 'Joshi Mohalla' and had blood stained arms in their hands. He called them but they did not stop. In the cross examination he admitted that prior to the incident Abdul Rasheed and the accused had no quarrel but liquor contractor, where Abdul Rasheed was employee, had grudge against the accused.

8. Ganpat Singh ASI (Pw.5) in his deposition stated that around 4 PM when he reached at the spot he found a person lying dead in a pool of blood. He was taken to the hospital where Mohd. Aslam identified the body as his uncle Abdul Rasheed. In the cross examination he admitted that when he reach at the place of incident nobody was present. He did not drew the

inquest report at the spot and removed the dead body in the Government vehicle. Simultaneously Aziz, Aslam, Guddu and Jamil reached to the Hospital.

9. Heera Lal IO (Pw.12) admitted in his cross examination that at the time of drawing site plan (Ex.P-16) he did not know the names of eye witnesses of the occurrence.

10. Saeed Ahmad and Mussabbir, whose names were referred by Mohd. Aslam (Pw.8) and Guddu (Pw.9), have been examined by the appellants as defence witnesses.

11. Mr. Bajwa, learned Senior Counsel canvassed that Mohd. Aslam (Pw.8) and Guddu (Pw.9) happened to be very closely related to the deceased. Since they are partisan and chance witnesses, their testimony by no standard of appreciation of evidence can be placed in the category of 'wholly reliable witness'. These witnesses being interested witnesses, their testimony calls for a critical appraisal. Stronger the incident is stated to have taken place in broad day light in an open market which was agog with activity, yet no independent witness has been examined by the prosecution. Testimony of related eye witnesses suffer from numerous incongruencies and embellishments rendering the same to be highly dubious. It is further contended that alleged recoveries of weapons at the hands of appellants, first of all, have not been proved with the aid of cogent and convincing evidence and secondly the same do not connect the appellants with the impugned offence. FSL report also does not further the case of prosecution. The FIR was sent to Magistrate after inordinate delay, which reflect that the same was prepared with due deliberations and concoction. As regards to the defence

evidence it is urged that the trial court rejected the same with callous indifference without due application of mind. Sayeed Ahmad was examined as Dw.1 by the appellants to show that Mohd. Aslam (Pw.8) and Abdul Rasheed (deceased) never came to meet him. It is further contended that Musabbir Hotel wala was not examined by the prosecution. Even 5 independent witnesses named as eye witnesses in the calendar of charge sheet were left and the Public Prosecutor did not choose to examine them despite their presence in the trial court they were left by the Public Prosecutor.

12. Per contra, Mr.M.L.Goyal, learned Public Prosecutor and Mr.Suresh Sahni, learned counsel for the complainant supported the impugned judgment and contended that presence of eye witnesses at the time of incident is established and in their cross examination nothing favourable to the appellants could be extricated. It is further urged that no doubt Mohd. Aslam and Guddu are kith and kin of the deceased but they have given a truthful version of the whole occurrence.

13. Before testing the evidence for its inherent consistency and inherent probability of the story, we deem it appropriate to refer the relevant case law on the issues involved in the matter.

14. In Dani Singh Vs. State of Bihar (2004)13 SCC 203, the Apex Court propounded in para 11 thus:-

“The emphasis in Section 149 IPC is on the common object and not on the common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and

that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word “object” means the purpose or design and, in order to make it “common”, it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression “in prosecution of common object” as appearing in Section 149 has to be strictly construed as equivalent to “in order to attain the common object”. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly.”

15. Hem Raj Vs. State of Haryana (2005)10 SCC 614, the Apex

Court propounded in para 8 and 9 as under:-

“8. The fact that no independent witness – though available, was examined and not even an explanation was sought to be given for not examining such witness is a serious infirmity in the prosecution case having regard to the indisputable facts of this case. Amongst the independent witnesses, Kapur Singh was one, who was very much in the know of things from the beginning. Kapur Singh is alleged to have been in the company of PW5 at a sweet stall and both of them after hearing the cries joined PW4 at Channi Chowk. He was one of those who kept the deceased on a cot and took the deceased to hospital. He was there in the hospital by the time the first IO, PW9 went to the hospital. The evidence of the first IO reveals that the place of occurrence was pointed to him by Kapur Singh. His statement was also recorded, though not immediately but later. The IO admitted that Kapur Singh was the eye witness to the occurrence. In the FIR, he is referred to as the eye witness along with PW5. Kapur Singh was present in the court on 6-10-1997. The Additional Public Prosecutor “gave up” the examination of this witness stating that it was unnecessary. The trial court commented that he was won over by the accused and therefore he was not examined. There is no factual basis for this comment. The approach of the High Court is different. The High Court commented that his examination would only amount to “proliferation” of direct evidence. But, we are unable to endorse this view of the High Court. To put a seal of approval on the prosecution's omission to examine a material witness who is unrelated to the deceased and who is supposed to know every detail of the incident on the ground of “proliferation” of direct evidence is not a correct approach. The corroboration of the testimony of the related witnesses Pws 4 and 5 by a known independent eyewitness could have strengthened the prosecution case, especially when the incident took place in a public place.”

“9. Non-examination of independent witness by itself may not give rise to adverse inference against the prosecution. However, when the evidence of the alleged eyewitnesses raises serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witness Kapur

Singh, would assume significance. This court pointed out in *Takhaji Hiraji v. Thakore Kubersing Chamansing* [(2001)6 SCC 145]:

“If already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself – whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein.”

16. In *Shankar Lal Vs. State of Rajasthan* (AIR 2004 SC 3559) the Hon'ble Supreme Court held as under:- (Para 5)

“Even according to the prosecution the only witness to the incident in question is PW-6 therefore as contended by learned counsel for the appellant we will have to examine his evidence carefully. If we do so then we notice that on the date of incident he had gone to a village upli for some work. From there he came back by bus at about 11 O' clock. He then allegedly went to the village to meet Ram Rakh where he was told by his wife that the latter had gone to the field. It is the prosecution case itself that the distance between the field of Ram Rakh and the village is about 4-5 miles and PW-6 covered that distance on foot and when he reached near the field of Ram Rakh he heard a

quarrel and when he went towards the place of quarrel he saw the appellant attack the deceased with an axe. It is his further case that when he reached near the deceased the appellant ran away. It is at this point of time he states that he got scared and he took a different route than the one he took on the way and reached the village at about 4 or 4.15 p.m. It is his case that when he went to the house of Ram Rakh he could not find him therefore he came near the village square where he met PW-2 Khyali Ram. From the above evidence of PW-6 it is apparent that though there were persons available on his way back, he did not inform anybody about the incident. Even when he reached the village and met Ram Rakh's wife he did not inform her about the incident and it is for the first time he informs about this incident to PW-2 at the village square at about 4.15 p.m. Contrary to what he stated in the examination in chief that he saw only one assault on the deceased, in the cross examination he stated that he saw the appellant attack the deceased twice and both the injuries were caused in his presence. It is also to be noticed from his cross examination that when he met PW-2 Khyali Ram and told him about the incident in question but PW-2 supposedly told him that he had already come to know of the incident from PW-14. The prosecution has not found how PW-14 came to know of the incident. IN this background if we appreciate the evidence of PW-6 we notice that he is purely a chance witness whose presence at the place of incident is highly doubtful. His conduct too seems to be unnatural in not informing anyone else in the village until he met Kyali Ram at the village square. We also notice that there is unexplained delay in filing the complaint inasmuch as according to the prosecution the incident in question took place at about 1.30 p.m. and a complaint was lodged only at 3.15 a.m. On 5-4-1980. Though the distance is about 30 miles from the place of incident, the complainant had the facility of using the tractors available in the village and they did use the same for travelling to the Police Station. In such circumstances this unexplained long delay also creates a doubt in our mind as to the genuineness of the prosecution case. Once we are not convinced with the evidence of PW-6 then there is no other material to base a conviction on the appellant hence we are of the opinion that the appellant is entitled to the benefit of doubt therefore this appeal succeeds and is allowed. The judgment and

order of conviction of the 2 Courts below are set aside. The appellant is acquitted of the charge framed against him. From the records we notice that the appellant is on bail. If so his bail bonds shall stand discharged.”

17. State of Punjab Vs. Sucha Singh (2003 Cri.L.J.1210) was the case where accused alleged to have killed deceased to avenge murder of his nephew. Eye witness father of deceased not tried to rescue his son, who sustained as many as 24 injuries. Such conduct of witness make his presence doubtful. Other eye witness did not own land in village and his presence at the place of occurrence was held doubtful. Contradiction between ocular and medical evidence as to number of injuries on deceased also make their presence doubtful. It was indicated as under:- (Para 10)

“PW-4 in his testimony before the Court stated that the accused also caused more injuries with their respective weapons on Sarabjit Singh. This witness was confronted with his statement recorded under section 161 CrPC where he has not stated. Apart from discrepancy between ocular and medical evidence with regard to the injuries sustained by the deceased Sarabjit Singh on his body, the fact that the deceased suffered as many as 24 bodily injuries makes all the more doubtful the presence of Pws4 and 5 at the place of occurrence. Inflicting 24 injuries on the body of deceased by the three accused persons would require a considerable amount of time. This itself suggests that the accused had sufficient time at their disposal to commit the crime. Any father, worth the name, would not remain a mute spectator when his son is being inflicted as many as 24 injuries at his very nose.”

18. In Krishna Ram Vs. State of Rajasthan (AIR 1993 SC 1386) the Hon'ble Supreme Court held as under:- (Para 4)

“We have gone through the evidence of the eye witnesses. No doubt Pws 1,2,3 and 6 are kith and kin of the deceased but they have given a truthful version of the whole occurrence. Even

Ex.P-1 all the material particulars are mentioned particularly the fact that the deceased was dragged to the house of A-1 and that there he was tied and beaten. As noted already even A-1 admitted that the deceased was tied in his house but added that because of the scuffle between PW.6 and the deceased, latter was tied. Immediately after registering the crime, the SHO went to the house of A-1 and found the deceased tied and he was having bleeding injuries. Thus the time, place of occurrence and the cause of death are established beyond doubt. So far as the presence and participation of the appellants are concerned there are statements of the eye-witnesses consistently to this effect. Both the Courts below have given cogent and convincing reasons for accepting the evidence of the eye witnesses. The evidence adduced in defence is not at all material and the courts below have rightly rejected the same. The trial court acquitted Keshra Ram A-6 giving the benefit of doubt. In our view the same in any manner does not affect the evidence of eye witnesses who are the most natural witnesses. We see absolutely no merits in these appeals. The appeals are dismissed accordingly.”

19. In Chanan Singh Vs. State of Haryana (AIR 1971 SC 1554) the evidence of sole witness to the occurrence was disbelieved on ground of his abnormal conduct after the occurrence. It was held:-

(para 13)

“The conduct of the witness in running away from the place of occurrence even though he was not chased or threatened by any one of the assailants and his not reporting the incident even to the relatives of either of the two deceased persons was treated as abnormal.”

20. In Ram Lakhan Vs. State of UP (AIR 1996 SC 3429) held that the evidence of close relatives of deceased is not liable to be rejected on the ground that they are interested witnesses. What is necessary is that Court should scrutinize evidence of such witness carefully.

21. In Baitullah Vs. State of UP (AIR 1997 SC 3946) Hon'ble Supreme Court held that evidence of interested witness cannot be discarded merely on ground that he is interested. It is normally expected that witness would not leave out real culprits and rope in innocent persons.

22. In Tapubha Bhagwanji Vs. State of Gujarat (AIR 2002 SC 2794) the Apex Court held as under:- (Para 12)

“The witnesses examined on behalf of the prosecution are witnesses who in normal course of event are expected to know about the incident. Their deposition do not reveal any good reason for rejecting their evidence as untrustworthy or unreliable. Nothing has been brought on record either in cross examination of the witnesses concerned or in any other evidence to show any good reason as to why they should falsely implicate the accused in the case. Thus rejection of their testimony on ground that they are interested witnesses being in relation of deceased, not proper.”

23. In Angnoo Vs. State of UP (AIR 1971 SC 296) the Apex court held that the fact of relationship would add to value of his evidence because he would be interested in getting the real culprit, rather than innocent persons, punished.

24. In Bolineedi Venkataramaiah Vs. State of Andhra Pradesh (AIR 1994 SC 76) the Apex Court considered the case where there was bitter enmity between prosecution party and accused party, group of persons chased deceased and inflicted injuries. The presence of witnesses at place of occurrence was not found doubtful. It was held that being interested witnesses their evidence was subjected to greater scrutiny. Specific overt acts attributed to accused. Corroboration of overt acts by medical and

circumstantial evidence was found. Only those accused to whom specific overt acts had been attributed consistently by all witnesses were convicted. The plea that some of the accused were acquitted, the same evidence cannot be accepted against other accused, was not found tenable.

25. In *Suraj Pal Vs. State of UP* (AIR 1994 SC 748) the Apex court found that the medical evidence fully establish the injury to eye witnesses, eye witnesses gave consistent version and it was held that their evidence cannot be discarded on ground that they were interested witnesses or that co-accused was acquitted on self-same evidence or that there were minor variations.

26. In *Balkar Singh Vs. State of Punjab* (AIR 1994 SC 1133) where the witness deposed against accused but he did not state about the weapon used, particulars of injuries and no overt act of violence proved against accused. The Apex Court held that mere presence of accused on the spot cannot make him liable for the offence.

27. In *Hukam Singh Vs. State of Rajasthan* (2000(4) Crimes 23) the Apex Court held that it is the discretion of Public Prosecutor not to examine any certain witness if he got reliable information that a category of witness would not support prosecution version and he is free to skip that witness.

28. In *Kartik Malhar Vs. State of Bihar* (1995)8 JT (SC) 425, the Apex Court held that “we may also observe that the ground that the witness being a close relative and consequently being partisan witness should not be relied upon, has no substance. This theory was repelled by this court as early as in *Dalip Singh's case* (AIR 1953 SC 364) in which this court expressed its

surprise over the impression which prevailed in the minds of the members of the bar that relatives were not independent witness Speaking through VIVIAN BOSE J., the Court observed para 25 of AIR 1953 SC):

“We are unable to agree with the learned Judges of the High Court that the testimony of the two eye witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the facts of seven men hangs on their testimony, we know of no such rules. If it is grounded on the reason that they are closely related to the deceased we are unable to concur.”

29. In State of Uttar Pradesh Vs. Farid Khan (2004 Cri.L.J.4970) the Apex Court indicated as under:- (Para 4)

“... Of course, the evidence of a witness, who has got a criminal background, is to be viewed with caution. But if such an evidence gets sufficient corroboration from the evidence of other witnesses, there is nothing wrong in accepting such evidence. Whether this witness was really an eye-witness or not is the crucial question. If his presence could not be doubted and if he deposed that he had seen the incident, the court shall not feel shy of accepting his evidence...”

30. In Thangaiya Vs. State of Tamil Nadu (2005 Cri.L.J. 684) the Apex Court indicated as under:-

“In a murder trial by describing the independent witnesses as ‘chance witnesses’ it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere ‘chance witnesses’. The expression ‘chance witness’ is borrowed from countries where every man's home is considered his castle and everyone

must have an explanation for his elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence. In instant case, the plea of the accused that PW-3 was 'chance witness' who has not explained how he happened to be at the alleged place of occurrence, it has to be noted that the said witness was an independent witness. There was not even a suggestion to the witness that he had any animosity towards the accused. Therefore, there is no substance in the plea that evidence of independent witness which is clear and cogent is to be discarded."

31. The principles laid down in the afore quoted judicial pronouncements may be summarized thus:-

- (i) Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141.
- (ii) The fact that no independent witness, though available, was examined, and not even an explanation was sought to be given for not examining such witness is a serious infirmity in the prosecution case.
- (iii) Non examination of independent witness by itself may not give rise to adverse inference against the prosecution. However, when the evidence of the alleged eye witnesses raises serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witness would assume significance.
- (iv) Evidence of close relatives of deceased is not liable to be rejected on the ground that they are interested witnesses. What is

necessary, the court should scrutinise such evidence carefully.

(v) It is the discretion of Public Prosecutor to examine any certain witness, if he got reliable information that a category of witness would not support the prosecution version. In such a situation, Public Prosecutor is free to skip that witness.

(vi) Evidence of a witness, who has got a criminal background, is to be viewed with caution.

32. Learned Senior Counsel vehemently urged that from the testimony of Ganpat Singh ASI (Pw.5) it is established that when he reached to the place of incident he found a dead body lying in the pool of blood and nobody was near him. According to learned Senior Counsel this testimony created a serious doubt about the presence of Mohd. Aslam at the time of incident. We have anxiously considered this submission. A look at the Inquest report (Ex.P-20) demonstrates that Ganpat Singh ASI (Pw.5) made following entry at 4.15 PM:-

"मन ए एस आई गणपत सिंह मय कान्स्टेबल विजय कुमार एन.81, सुरेश कुमार एफ सी 156, बन्ने सिंह एन.394 अर्जुन लाल एम 146 के थाने से खाना लेकर मौके पर पहुंचा। एन 394 को मौके पर सुरक्षा हेतु छोड़ा गया। मौके पर पड़ी मृतक की लाश को मय असलम के जर्ज जीप हमरा लेकर अस्पताल पहुंचा। लाश को मुर्दाघर में रखवायी।"

(Emphasis Supplied)

Ganpat Singh was not confronted with the inquest report in the cross examination and we see no reason to disbelieve the entry made in the inquest report. Presence of Aslam (Pw.8) is very well established from the inquest report and contention raised by learned counsel is devoid of merit.

33. It is next contended by learned Senior Counsel that the evidence of Saeed (Dw.1) and Musabbir (Dw.2) caused dent in the

prosecution story and the origin and genesis of the occurrence could not be brought to the notice of the court. Having gone through the testimony of these witnesses we find that they were examined on January 25, 2001 i.e. after about four years and four months of the incident. How could they remember that four years back on a particular day who had come to meet and who took tea in the hotel. If they did not support the prosecution story, how it could be inferred that origin and genesis of the occurrence has been withheld by the prosecution?

34. Third contention of learned Senior Counsel was about the conduct and character of Aslam and Guddu. Concededly both these witnesses were not involved in a murder case on the date of the incident. However, on the date of their examination before the trial court they were confined in the prison for committing offence under section 302 IPC. We have viewed the testimony of Aslam and Guddu with caution and we do not doubt their presence at the time of incident. Despite searching cross examination their evidence could not be shattered. Evidently, Tonk, where the incident occurred, is a small town and distances can be covered on foot. As per the testimony of Aslam, he was coming on foot with the deceased and on the way he met Guddu, who was standing outside of Mussabbir's Hotel. It is no doubt true that Aslam and Guddu are near relatives of the deceased but their evidence cannot be discarded merely on the ground that they are interested witnesses. Why would they leave out real culprit and rope innocent persons. So far as their conduct in not rescuing the deceased is concerned, we find no abnormality in it. When sharp edged weapons were mercilessly thrust on the person of deceased, who sustained as many as 19 incised and punctured wounds, it could not be expected from the teenagers

to rescue the deceased.

35. Admittedly Public Prosecutor while conducting trial did skip independent witnesses, but non examination of independent witnesses by itself does not give rise to adverse inference against the prosecution. Having closely scrutinised the testimony of Aslam (Pw.8) and Guddu (Pw.9) with broad reference to its trustworthiness and truthfulness, we find their presence highly natural and on comprehensive appreciation of all vital features and with reference to reasonable probabilities of the case, we are of the opinion that testimony of these witnesses does inspire confidence. The infirmities pointed out by learned Senior Counsel do not go to the root of the matter. However looking to the evidence of Aziz (Pw.11), who saw only appellants Farukh, Bundu, Nasib and Hasib running having blood stained weapons in their hands immediately after the incident, possibility of over implication of appellants Jagdish and Abdul Qayum cannot be ruled out and we grant them benefit of doubt.

36. As a result of the above discussion, we dispose of the instant appeals in the following terms:-

- (i) Appeals of appellants Jagdish and Abdul Qayum are allowed and they stand acquitted of all the charges. Appellants Jagdish and Abdul Qayum, who are in jail, shall be set at liberty forthwith, if they are not required to be detained in any other case.
- (ii) Appeals of appellants Farukh, Bndu Khan, Nasib and Hasib stand dismissed and conviction and sentence awarded to them by learned trial Judge are maintained.

(iii) Impugned judgment of learned trial court stands modified as indicated above.

(Sangeet Lodha),J.

(Shiv Kumar Sharma)J.

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